

**UNITED STATES DISTRICT COURT**

# DISTRICT OF NEVADA

Ervin Middleton,

2:16-cv-01369-JAD-GWF

Plaintiff

V.

## Order

Omely Telecom Corp. aka Pro Tax & Accounting,

[ECF Nos. 36, 37]

## Defendant

After two years and several orders, this is a single-count Telephone Consumer Protection Act (TCPA)<sup>1</sup> case in which service has not yet been properly effected on the lone defendant.

Plaintiff Ervin Middleton moves a second time for reconsideration of the denial of his requests for various types of writs. He also seeks my recusal for obvious “bias” he claims is evidenced by my unfavorable rulings on his motions, and in his request, he asks me to dismiss this case. I deny the motions for reconsideration and recusal because they lack merit. I also clarify that Middleton still has the ability to dismiss this case simply by filing a notice of voluntary dismissal. But if he wants this case to proceed, he will need to properly serve Omely Telecom Corp. with the original complaint and a newly issued summons by September 25, 2018.

**A. Middleton has until September 25, 2018, to serve Omely Telecom Corp. with the original complaint and a new summons.**

Middleton filed this case against Omely Telecom Corporation for violating the TCPA “by leaving 32 recorded messages using [an] automatic telephone dialing system or artificial or prerecorded voices” on Middleton’s home phone in the summer of 2013.<sup>2</sup> When Middleton amended that complaint to add a broad array of civil-rights and other claims against Henderson

<sup>1</sup> 47 U.S.C. § 227 et seq.

<sup>2</sup> ECF No. 3 at 2.

1 City officials, state judges, the district and magistrate judges that his TCPA case was originally  
2 assigned to, various banks, and the Internal Revenue Service,<sup>3</sup> Magistrate Judge George Foley  
3 struck that amended complaint and the summonses issued in conjunction with it,<sup>4</sup> and this case  
4 proceeded forward in its original posture against Omely Telecom only. Because it was the  
5 amended complaint that Middleton had served on Omely, that proof of service was among those  
6 struck,<sup>5</sup> leaving no evidence in the record that Omely had been served with process. So the Clerk  
7 of Court issued a notice to Middleton under FRCP 4(m) advising that his claims against Omely  
8 were at risk of being dismissed for failure to serve.<sup>6</sup> Middleton responded by noting the service  
9 history.<sup>7</sup>

10 Middleton is correct that Omely has been served with something, but because that  
11 amended complaint is not viable, it is the original complaint [ECF No. 3] that he needs to serve  
12 on Omely along with a new summons that reflects the proper, single-defendant caption.<sup>8</sup> It  
13 appears that some confusion has arisen because the order striking the amended complaint and its  
14 corresponding summonses did not direct Middleton to serve the original complaint on Omely.  
15 **Accordingly, I find good cause in the interest of justice under FRCP 4(m) to extend to**  
16 **September 25, 2018, the deadline to serve the original complaint [ECF No. 3] and a**  
17 **properly issued, properly completed summons on Omely.** So I direct the Clerk of Court to  
18 issue a new summons for this purpose and provide Middleton with the form he needs to obtain  
19 the U.S. Marshal's assistance to effectuate service of his original complaint and a new summons  
20 on Omely.

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22 <sup>3</sup> ECF No. 8 (stricken).

23 <sup>4</sup> ECF No. 19.

24 <sup>5</sup> ECF No. 14 (stricken).

25 <sup>6</sup> ECF No. 39 (notice).

26 <sup>7</sup> ECF No. 40.

27 <sup>8</sup> Like the one at ECF No. 4, but the new version will need Omely's address, too.

1      **B. Middleton’s objection is overruled [ECF No. 36].**

2      Middleton has asked for a variety of relief in this TCPA action, including a “writ of error  
3      quae coram nobis residant,” a petition for writ of habeas corpus, and a demand for a habeas  
4      corpus hearing. Central to all of those requests was his belief that magistrate judges lack the  
5      authority to issue rulings in this case.<sup>9</sup> I denied those requests with a detailed, fully explained  
6      order.<sup>10</sup> Middleton objected to that order and demanded “a writ of quo warranto.”<sup>11</sup> I liberally  
7      construed that objection as a motion for reconsideration and denied it.<sup>12</sup> He now moves again for  
8      reconsideration.<sup>13</sup>

9      This objection and reconsideration motion—founded primarily on Middleton’s erroneous  
10     belief that the undersigned is a magistrate judge, not a district judge—is without merit. The  
11     district court did not “breezily ignore[]” evidence that supported his entitlement to a writ of  
12     habeas corpus, and the various Black’s Law definitions that he quotes to support his “objection”  
13     do not persuade this district court that its prior ruling deserves reconsideration.<sup>14</sup> So I overrule  
14     this objection and deny reconsideration.

15      **C. Recusal is not warranted [ECF No. 37].**

16      Middleton has filed an “Affidavit of Recusal and Malfeasance of Office and Misfeasance;  
17      verified,”<sup>15</sup> which I liberally construe as a request that I recuse myself from his case. In it, he

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19      <sup>9</sup> ECF Nos. 23, 24, 30, 32.

20      <sup>10</sup> ECF No. 33.

21      <sup>11</sup> ECF No. 34.

22      <sup>12</sup> ECF No. 35.

23      <sup>13</sup> ECF No. 36.

25      <sup>14</sup> Middleton also suggests again that this court lacks jurisdiction over his case, *see* ECF No. 36 at  
26      3, but *he filed this case* under the TCPA, a federal statute, and *he stated in his complaint* at  
27      paragraph 2 that this court has jurisdiction over this action by virtue of that very statute. *See* ECF  
28      No. 3 at ¶ 2.

15      <sup>15</sup> ECF No. 37.

1 contends that my rulings in this case have been arbitrary and negligent, which “show[s] that” I  
2 am “biased and prejudiced against [him] and unable to be fair, competent or impartial in this  
3 matter” and that “any order issued against [him] was prejudicial, corrupt and therefore void from  
4 its inception and this matter should summarily be dismissed.”<sup>16</sup> Among my transgressions, he  
5 contends that I “stepped out of [my] function as a magistrate and, by [my] actions and statements,  
6 figuratively assumed the cloak of a tribunal,” thus “outrageously exceeding [my] authority” in  
7 this case.<sup>17</sup>

8 Middleton’s belief that the undersigned is a magistrate judge is simply wrong; I am the  
9 district judge assigned to his case. Beyond that, his complaints are entirely rooted in his  
10 disagreement with my rulings in this case.<sup>18</sup> As the United States Supreme Court explained in  
11 *Liteky v. United States*, however, opinions formed by the judge “in the course of the current  
12 proceedings . . . do not constitute a basis for a bias or partiality motion unless they display a  
13 deep-seated favoritism or antagonism that would make fair judgment impossible,”<sup>19</sup> and  
14 Middleton has made no such showing. He has only pointed out that this district judge has denied  
15 motions in this case and he reiterates some of the reasons he believes those rulings were  
16 erroneous. But unfavorable rulings are a basis for appeal, not recusal.<sup>20</sup> Middleton’s request for  
17 recusal is denied.

18 **D. Middleton may voluntarily dismiss this case.**

19 Finally, I would be remiss if I did not address one point that keeps coming up in  
20 Middleton’s filings. He has expressed several times that this court lacks jurisdiction,<sup>21</sup> and in his

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22 <sup>16</sup> *Id.* at 2–3 (original emphasis deleted).

23 <sup>17</sup> *Id.* at 4.

24 <sup>18</sup> See generally ECF No. 37.

25 <sup>19</sup> *Liteky v. United States*, 510 U.S. 540, 555 (1994).

26 <sup>20</sup> *Liteky*, 510 U.S. at 555.

27 <sup>21</sup> See note 14, *supra*.

1 recusal affidavit, he specifically states that “**this matter should be summarily dismissed.**”<sup>22</sup>  
2 Middleton filed this case. And, in light of its procedural posture, Middleton still has the ability  
3 to voluntarily dismiss it under Rule 41(a)(1)(A). So, if Middleton wants this case dismissed, all  
4 he has to do is file a Notice of Voluntary Dismissal under Rule 41(a)(1)(A) stating that he is  
5 voluntarily dismissing this case, and the court will dismiss it, close it, and issue no further orders  
6 in this case. But if he wants to proceed with this case, Middleton must ensure that Omely is  
7 served with the original complaint and new summons by September 25, 2018, or the court will  
8 dismiss this case without further prior notice.

9 **Conclusion**

10 Accordingly, IT IS HEREBY ORDERED that:

11 • The “Objection to Order Denying Writ and to Relief and Reconsideration” [ECF No. 36]  
12 **is DENIED;**  
13 • The request for recusal [ECF No. 37] **is DENIED**; and  
14 • The Clerk of Court is directed to ISSUE SUMMONS to Omely Telecom Corp., 6825  
15 Stockton Blvd # 280, Sacramento, CA 95823, and DELIVER that summons and a copy of  
16 the original complaint [ECF No. 3] to the U.S. Marshal for service. The Clerk of Court is  
17 further directed to SEND the required USM-285 form to Middleton, who will then have  
18 20 days to provide the required USM-285 form to the U.S. Marshal at 333 Las Vegas  
19 Blvd. So., Suite 2058, Las Vegas, Nevada 89101. After Middleton receives copies of the  
20 completed USM-285 form from the U.S. Marshal, he has 20 days to file a notice with the  
21 court identifying if Omely was served with the summons and original complaint. If  
22 Omely is not served, and Middleton wishes to have the U.S. Marshal attempt service on it  
23 again, then Middleton must file a motion with the court that specifies a more detailed  
24 name and address and indicates whether some other manner of service should be used. It  
25 is up to Middleton to ensure that service is properly effectuated by the extended deadline

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28 <sup>22</sup> ECF No. 37 at 2–3 (emphasis in original).

1 provided in this order—September 25, 2018. **If Omely Telecom Corp. is not properly**  
2 **served with the original complaint and the new summons by September 25, 2018,**  
3 **this case will be dismissed under FRCP 4(m) without further prior notice.**

4 DATED: July 27, 2018.

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6 U.S. District Judge Jennifer Dorsey  
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